

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

GEORGE SIEPEL; PHYLLIS SIEPEL; H.
CRAIG WILLIAMS; ELINOR TAMA
WILLIAMS; CONSTANCE ELAINE
WILLIAMS; DONNA N. REINKE; ROBERT
COHEN; CARL M. PAGE and all others
similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A.; COLUMBIA
FUNDS SERIES TRUST f/k/a NATIONS
FUNDS TRUST; COLUMBIA
MANAGEMENT ADVISORS, LLC,
COLUMBIA MANAGEMENT
DISTRIBUTORS, INC., BANC OF AMERICA
INVESTMENT SERVICES, INC. AND BANK
OF AMERICA CORPORATION,

Defendants.

Case No. 4:05-CV-2393 (RWS)

**MOTION TO DISMISS OF DEFENDANTS BANK OF AMERICA, N.A., COLUMBIA
MANAGEMENT ADVISORS, LLC, COLUMBIA MANAGEMENT DISTRIBUTORS,
INC., BANC OF AMERICA INVESTMENT SERVICES INC.,
AND BANK OF AMERICA CORPORATION**

Defendants Bank of America, N.A. (the “Bank”), Columbia Management Advisors, LLC, Columbia Management Distributors, Inc., Banc of America Investment Services, Inc. and Bank of America Corporation (“BAC”) (collectively “Defendants”) respectfully move this Court for an order declining jurisdiction and dismissing the Amended Complaint on the following grounds:

1. This Court should decline jurisdiction and dismiss the Amended Complaint because Plaintiffs and their attorneys have engaged in impermissible judge shopping and have violated the first-filed rule.

2. Styled as a putative class action, Plaintiffs’ claims arise from being beneficiaries of certain trusts, an estate, and an IRA for which the Bank serves as trustee. In the Amended Complaint, Plaintiffs allege claims pursuant to the Investment Adviser Act, federal securities laws, breach of contract, breach of fiduciary duty and unjust enrichment.

3. Plaintiffs and their attorneys contend that the Amended Complaint asserts the same claims and seeks to certify the same class as five other cases filed by the same Plaintiffs' attorneys: By filing these six cases, voluntarily dismissing them in order to avoid Court-imposed deadlines and unfavorable rulings, and reasserting those dismissed claims in other cases, Plaintiffs and their attorneys have engaged in impermissible judge shopping. Therefore, the Court should exercise its authority to decline jurisdiction over this case and dismiss the Amended Complaint.

4. Plaintiffs and their attorneys filed the Amended Complaint in this case despite the fact that another case, *Kutten, et al. v. Bank of America, NA, et al.*, United States District Court for the Eastern District of Missouri, No. 4:04-CV-00244, is already pending in this Court and, according to Plaintiffs and their attorneys, asserts the same claims and seeks to represent the same putative class as this case. By filing this case with *Kutten* pending, Plaintiffs and their attorneys have violated the first-filed rule. Accordingly, the Court should decline jurisdiction over this case.

5. Defendants respectfully request that, pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court should dismiss the Amended Complaint for numerous reasons, including the following:

(a) Plaintiffs' claim under the Investment Advisers Act in Count I should be dismissed because Plaintiffs have failed to allege facts to demonstrate that Defendants are "investment advisors" under this Act and because, as the Supreme Court has confirmed, there is no private right of action for the claim Plaintiffs are attempting to assert.

(b) Counts II and III asserting securities law claims should be dismissed because Plaintiffs lack standing to bring these claims, the claims are time-barred and because Plaintiffs have failed to plead requisite elements as a matter of law.

(c) Federal law, specifically the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), preempts Plaintiffs' state law claims mandating dismissal. Just two weeks ago, a federal court dismissed the very same state law claims based upon the same allegations raised

herein – challenging investment of trust assets in affiliated mutual funds. The court held that the state law class claims should be dismissed not only because they were preempted under SLUSA, but also because they failed to state a claim as a matter of law. Spencer v. Wachovia Bank, N.A., 05-81016-CIV-RYSKAMP/VITUNAC, Slip Op. (S.D. Fl. May 10, 2006). The same result should be reached here.

(d) Finally, Plaintiff Cohen failed to comply with the mandatory arbitration provision in his IRA instrument. Plaintiff Cohen's IRA with the Bank, which forms the basis for his claims in this case, contains an arbitration provision contractually requiring him to submit all claims regarding his IRA to mandatory arbitration. Plaintiff Cohen failed to submit his claims in this case to mandatory arbitration; therefore, he has failed to state a claim upon which relief can be granted and his claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

6. Defendants incorporate herein their supporting Memorandum of Law accompanying this Motion.

WHEREFORE, for the reasons set forth in this Motion and the accompanying Memorandum of Law, Defendants respectfully request that the Court decline jurisdiction and dismiss the Amended Complaint; or, in the alternative, the Court dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

DATED: May 19, 2006

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this 19th day of May, 2006 upon the following counsel of record by the Court's electronic filing system:

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